90-1671

No. 90-1761

In The

Supreme Court of the United States

October Term, 1990

STELLA HULL,

Petitioner,

vs.

JERRY SHUCK AND GEORGE PLANCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

JOHN T. MEREDITH
(Counsel of Record)
HELEN KRYSHTALOWYCH
MARTIN HARRIS
SQUIRE, SANDERS
& DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Respondents

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PETITIONER'S §1985(3) ARGUMENT RAISES NO ISSUE OF PUBLIC INTEREST	3
A. It Is Unnecessary To Even Consider The Legal Theory Petitioner Advances, Because The Facts Fail To State A Claim Even Under Her Theory	3
B. The Court Of Appeals Decided The Intra-corporate Conspiracy Issue Correctly	5
II. PETITIONER'S §1981 ARGUMENT RAISES NO QUESTION OF PUBLIC INTEREST	8
A. The Relevant Federal Questions Are Settled; The Only Issue In Dispute Is A Question Of State Law	8
B. The Court Of Appeals Decided The §1981 Issue Correctly, Because A Non-Renewal Under O.R.C. §3319.11 Is A Termination Of Employment	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Brereton v. Communications Satellite Corp., 735 F. Supp. 1085 (D. D.C. 1990)	10
Carter v. O'Hare Investors, 736 F. Supp. 158 (N.D. Ill. 1989)	10
Courtney v. Kenyon Television & Appliance Rental, Inc., 899 F.2d 845 (9th Cir. 1990)	9
Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594 (8th Cir. 1984)	6
Edens v. Barberton Area Family Practice Center, 43 Ohio St. 3d 176 (1989)	11
Gonzalez v. Home Insurance Co., 909 F.2d 716 (2nd Cir. 1990)	9
Griffin v. Breckenridge, 403 U.S. 88 (1971)	4, 5
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	8
Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989)	12
McKnight v. General Motors Corp. 908 F.2d 104 (7th Cir. 1990)	9, 10
Patterson v. McClean Credit Union, 109 S.Ct. 2363 (1989)	9, 10, 11
Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990)	9
Struthers City School Board of Education v. Struthers Education Association, 6 Ohio St. 3d 308 (1983)	11
Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990)	4
Travis v. Gary Community Mental Health Center, 921 F.2d 108 (7th Cir. 1990)	6, 7
United Brotherhood of Carpenters, Local 610 v. Scott, 463 U.S. 825 (1983)	4

Cases	Page
United States v. Hartley, 678 F.2d 961 (11th Cir. 1982)	6
Walker v. South Central Bell Telephone Co., 904 F.2d 275 (5th Cir. 1990)	9
STATUTES:	
42 U.S.C. §1981	8-12
42 U.S.C. §1983	7, 8
42 U.S.C. §1985(3)	3-8
Ohio R.C. §3319.11	10-12

COUNTERSTATEMENT OF THE CASE

There are two significant errors and/or omissions in petitioner's statement of the case. The first relates to the District Court's disposition of the §1985(3) conspiracy claim. Petitioner points out that the Court of Appeals affirmed dismissal of this claim on purely legal grounds, relying on the intracorporate conspiracy doctrine. But she fails to mention the reason the District Court dismissed it. The district court found, "Hull has not presented a scintilla of evidence that the defendants by agreement induced the Board to non-renew her contract." (Memorandum Opinion at 12; App. at A-49 - A-50). Accordingly, the District Court dismissed the §1985(3) claim on factual grounds, for failure to meet her Rule 56 responsibility to offer some proof of a racially motivated conspiracy. The Court of Appeals never disturbed that finding; it simply elected to affirm on an alternative, independently sufficient legal ground.

Second, petitioner mischaracterizes the disposition of the claim against defendant Shuck. The Court of Appeals rejected most of petitioner's evidence as legally insufficient to raise any inference of discrimination. It remanded the §1983 claim against Shuck only for clarification of a single factual point, indicating that once respondents establish this fact, summary judgment for defendant Shuck will be appropriate (emphasis added):

> Although we believe the remarks made by defendant Schuck [sic] to Hull during the April 5, 1987 meeting are *racially neutral* and alone are not sufficient probative evidence of discriminatory intent, we believe *it would be proper to grant summary judgment* to defendant Shuck only *after* it were conclusively determined that plaintiff's position was not continued.

(Court of Appeals Opinion, App. at p. A-15). [1]

SUMMARY OF ARGUMENT

The §1985(3) question petitioner raises — regarding the intracorporate conspiracy doctrine — need not be reached. Even assuming a conspiracy claim theoretically could lie against co-employees who jointly discuss personnel decisions, the *facts* of this case contain not one "scintilla" of evidence suggesting a racially-motivated conspiracy, as the district court expressly held. Thus, the issue petitioner attempts to raise need not be reached, and certainly does not affect the outcome of this case. In any event, the Court of Appeals correctly interpreted §1985(3) when it adopted and applied the intracorporate conspiracy doctrine to bar petitioner's claim as a matter of law.

As to the §1983 argument, the question petitioner raises is primarily one of state law. The issue is whether failure to renew a non-tenured teaching contract, pursuant to Ohio Revised Code §3319.11, constitutes a termination of employment (i.e., a discharge) or a failure to hire. That question of Ohio law should be of no interest

[1] The debate over discontinuation of plaintiff's position is ridiculous. Plaintiff taught word processing enrichment, a position eliminated due to declining enrollment. A different "enrichment" position remained open the following year, but it involved computer aided design; it was not the word processing enrichment position plaintiff had held.

"Enrichment" is a generic term, just like "classroom teacher" is a generic phrase. There are enrichment positions in several subject areas, just as there are classroom teaching positions in many different fields. Nonetheless, the Court of Appeals remanded, requiring defendants to submit an affidavit to this effect. Once defendants do so, summary judgment for Shuck is appropriate under the Court of Appeals' holding.

to this Court, and even if it were, the Courts below decided it correctly.

ARGUMENT

I. PETITIONER'S §1985(3) ARGUMENT RAISES NO ISSUE OF PUBLIC INTEREST.

A. It Is Unnecessary To Even Consider The Legal Theory Petitioner Advances, Because The Facts Fail To State A Claim Even Under Her Theory.

Petitioner argues that a conspiracy claim under 42 U.S.C. §1985(3) should not automatically be precluded. She challenges the intracorporate conspiracy doctrine, which holds, as a matter of law, that no "conspiracy" can exist among employees of a single corporation, at least not when all they do is make a joint recommendation while acting within the scope of their employment. Petitioner is wrong on the legal issue, but there is no need to reach it. Even assuming a conspiracy claim is not automatically precluded, she cannot survive summary judgment here, based on the undisputed *facts* of this case.

The District Court found, "Hull has not presented a scintilla of evidence that the defendants by agreement induced the Board to non-renew her contract." (Memorandum Opinion at 12; App. at A-49 - A-50). The opinion further states, "In light of this ruling, the court need not address defendants' argument that Hull failed to state a §1985(3) claim because of the intracorporate conspiracy rule." (Memorandum Opinion at 12; App. at A-50 n. 8).

The District Court's conclusion — there was absolutely no evidence of a racially motivated conspiracy — clearly was correct. To prove a §1985(3) claim, plaintiff must prove several elements, including the existence of

a tacit or express *agreement* between defendants (*i.e.*, a meeting of the minds) to commit an *unlawful* act. *United Brotherhood of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Trautvetter v. Quick*, 916 F.2d 1140, 1153 (7th Cir. 1990) ("allegations of conspiracy must be supported by facts suggesting a meeting of the minds between two or more persons"). Yet plaintiff herself admitted:

> Q. Do you remember telling me anything that supports a contention that you were plotted against because of your race?
>
> A. I said there was a conspiracy or something?
>
> Q. Yes.
>
> A. No, I don't recall telling you anything that there was a conspiracy.
>
> * * *
>
> Q. Do you have any facts to support your belief that Mr. Romes and/or Doctor Plance and/or Doctor Schuck [sic] and/or any other individual at the school district got together and decided that you would be non-renewed because of your race?
>
> A. I don't have any facts. I don't know what, you know, they talk about when they get together or whatever, you know.

(R. 23: Deposition of Stella Hull, pp. 315-16, Exhibit F to Defendants' Brief submitted in the Court of Appeals).

The evidence shows only that Shuck and Plance discussed non-renewals, as part of their routine job duties. Even assuming, *arguendo*, each defendant was *secretly* motivated by racial animus during this decision-

making, that establishes only *independent* discriminatory conduct, not the required meeting of the minds. (Supra, p. *). So far as each defendant was aware, the other defendant was acting solely to promote the school district's interests, and that does not constitute a *racially motivated* conspiracy. *See Griffin v. Breckenridge*, 403 U.S. at 102-03 ("there must be some racial . . . onimus behind the conspiracy action").

These arguments were briefed and raised in the Court of Appeals, but the Court elected to affirm based on the intracorporate conspiracy doctrine. (Court of Appeals Opinion, App. at A-7 - A-8). The appellate court acted properly, because that doctrine provides an independently sufficient ground for dismissing the §1985(3) claim. But the Court of Appeals never disturbed the District Court's factual analysis and corresponding holding, which likewise constitutes an independently sufficient basis for the summary judgment. Thus, there is no need to even consider the intracorporate conspiracy doctrine. This claim can be, should be, and originally was dismissed on purely factual grounds.

B. The Court Of Appeals Decided The Intracorporate Conspiracy Issue Correctly.

Plaintiff apparently concedes that if the intracorporate conspiracy doctrine is valid, her §1985(3) claim is precluded. However, she asserts there is a circuit split, and urges this Court to repudiate the doctrine, at least as applied to §1985(3) claims.

While there is some disagreement among the circuits, it is not as widespread as plaintiff suggests. She claims the First, Third, Fifth and Eleventh Circuits have held this doctrine inapplicable to §1985(3) actions, but that is not true. The Fifth Circuit case she cites is

Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594 (5th Cir. 1984). *Dussouy* was not a §1985(3) case; in fact, it was not even decided under *federal* law. It was a state law antitrust case in which the Court held, "[A]lthough Louisiana law differs from the federal [intracorporate conspiracy] rule, *Erie v. Tompkins* . . . mandates application of the Louisiana rule." *Dussouy*, 660 F.2d at 604.

Likewise, plaintiff's Eleventh Circuit case, *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), did not involve §1985(3), but rather was a criminal case under 18 U.S.C. §371. No case decided by either the Fifth or Eleventh Circuit has held the intracorporate conspiracy doctrine inapplicable to §1985(3) actions. The weight of appellate authority supports defendants' position, with only the First and Third Circuits taking contrary views.

Further, logic supports the conclusion reached by the majority of appellate courts, including the one below. Internal discussions among employees of one corporation, relating solely to personnel actions within the corporation, are not the kind of behavior §1985(3) was intended to address:

> Section 1985 descends from the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act . . . Congress was concerned not about unilateral action but about organized resistance to emancipation and civil rights. Fear of violence (a theme running throughout the text of and debates on the 1871 act) could *unite disparate centers of influence* . . . . The Klan *meddled in the business of others*; that is what made it dangerous. The [defendant employer, by contrast,] minded its own business.

Travis v. Gary Community Mental Health Center, 921 F.2d 108, 110 (7th Cir. 1990). Plainly, employees of one

corporation making joint recommendations in the ordinary course of business is not the kind of "meddl[ing] in the business of others" with which §1985(3) is concerned.

Moreover, the intracorporate conspiracy doctrine recognizes the reality of how personnel decisions are made. There are legitimate reasons for persons within a corporation to discuss and act jointly on personnel matters. Nor is it unusual, when supervisory employees agree on a personnel decision, for each to have different reasons for supporting the decision (one common reason being a desire for consensus). Thus, the mere fact two employees meet and then both support a personnel decision does not remotely suggest any illicit conspiracy occurred,[2] even if it later turns out one employee was motivated by racial animus. It would be grossly unfair to permit an inference of racially-based conspiracy, based solely on the fact defendants followed normal business practices and discussed their personnel recommendations, when there is not one "scintilla" of evidence that the subject of race even came up in defendants' meetings.[3]

Finally, petitioner's position creates a substantial litigation burden for no good reason, as illustrated by the present case: Petitioner's claims under 42 U.S.C. §1983 have been remanded. What gain is there in *also*

---

[2]This is what distinguishes intracorporate personnel discussions from other alleged "conspiracies." In an ordinary conspiracy case, the mere fact two parties get together and agree to do something (such as fix prices or rob a bank) proves unlawful conduct. But in the intracorporate personnel context, there is nothing inherently unlawful about co-employees getting together and making a joint recommendation to discharge someone.

[3]Again, petitioner *concedes* she has absolutely no evidence of what they discussed among themselves. (*Supra*, p. *).

proceeding with a §1985(3) action, for conspiracy to violate §1983? That simply multiplies the number of claims, prolonging and complicating the litigation, without adding to the available remedies *or* the circumstances in which petitioner can recover.

Such redundant litigation would be commonplace were it not for the intracorporate conspiracy doctrine. In today's world, two or more persons participate in *most* personnel decisions. But for the intracorporate conspiracy doctrine, plaintiffs likely would allege §1985(3) conspiracy claims in virtually all employment discrimination cases against public defendants. There is no reason to encourage such a multiplication of claims, particularly against public officials. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (recognizing societal "costs of subjecting officials to the risks of trial"). Avoiding charges of conspiracy every time two or more public officials participate in a personnel decision is a good reason to retain the intracorporate conspiracy doctrine.

In sum, the legal question petitioner raises need not be reached to resolve this case. Further, the Court of Appeals correctly followed the majority rule in adopting the intracorporate conspiracy doctrine. This Court should not grant certiorari to review a question that need not be decided and which was decided correctly below.

II. PETITIONER'S §1981 ARGUMENT RAISES NO QUESTION OF PUBLIC INTEREST.

A. The Relevant Federal Questions Are Settled; The Only Issue In Dispute Is A Question Of State Law.

It is settled law that discharges are not actionable under §1981. This Court established the basic rules for

§1981 actions in *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989). Since that decision, courts of appeals overwhelmingly have held that actions for discharge are not cognizable under §1981.[4] Plaintiff disputed this proposition below, but now apparently concedes the futility of further argument on this point.

Thus, the only remaining issue is whether non-renewal of a teacher's contract, under Ohio Revised Code §3319.11, is a discharge/termination as opposed to a failure to hire. The courts below correctly held it is a termination, but that question of Ohio law should not be of interest to this Court.

B. The Court Of Appeals Decided The §1981 Issue Correctly, Because A Non-Renewal Under O.R.C. §3319.11 Is A Termination Of Employment.

Plaintiff was employed until the Board non-renewed her limited contract, pursuant to Ohio R.C. §3319.11. The District Court correctly held, "Under Ohio law, nonrenewal is the equivalent of employment termination." (Memorandum Opinion at 7; App. at p. A-36). Plaintiff's contrary characterization, that the Board failed to enter into a new, albeit identical contract, is plainly wide of the mark.

This Court previously considered and rejected a variant of petitioner's theory, posed hypothetically by Justice Stevens' dissent in *Patterson*. Any discharged employee at-will can make exactly the same argument petitioner does — he/she was not discharged; rather,

[4] *E.g., Gonzalez v. Home Insurance Co.*, 909 F.2d 716 (2d Cir. 1990); *Walker v. South Central Bell Telephone Co.*, 904 F.2d 275 (5th Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990); *Courtney v. Kenyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990).

the "old" employment contract expired and the employer refused to enter into a "new" one. In Justice Stevens' words, "An at-will employee, such as petitioner, is not merely performing an existing contract; she is constantly remaking that contract." 109 S.Ct. at 2396 (dissenting).

The majority in *Patterson* credited Justice Stevens with "ingenuity," then rejected his view and warned lower courts to avoid such mental gymnastics and follow a "straightforward" approach. 109 S.Ct. at 2377 n.6. Lower courts have followed that admonition, overwhelmingly rejecting petitioner's theory when advanced by employees at-will:

> We are mindful of the argument that employment at will... should be analyzed not as a single contract but as a series of fresh contracts made every day of continued employment; on this view, termination on racial grounds prevents the employee from making the next day's contract of employment.

McKnight, 908 F. 2d 104 (rejecting the quoted theory as "artificial"). *See also Brereton v. Communications Satellite Corp.*, 735 F. Supp. 1085, 1088 (D. D.C. 1990) ("the great creativity of this argument [by at-will employees] is inversely proportional to the acceptance that it has garnered"). As another court summarized:

> Reinstatement of the identical employment relationship, with the same rights, duties and obligations of the old agreement, is not a new and distinct relation covered by §1981.

Carter v. O'Hare Investors, 736 F. Supp. 158 (N.D. Ill. 1989) (rejecting at-will employee's argument).

Further, the courts below properly interpreted Ohio Revised Code §3319.11. The Ohio Supreme Court

frequently refers to non-renewals under §3319.11 as "terminations." *E.g., Edens v. Barberton Area Family Practice Center*, 43 Ohio St. 3d 176, 179 (1989) (under §3319.11, notice "must be given on or before April 30 of the school year preceding *termination*") (emphasis added); *Struthers City School Board of Education v. Struthers Education Association*, 6 Ohio St. 3d 308, 309 (1983) ("R.C. 3319.11 sets forth certain procedures which must be followed by a board of education when *termination* of a nontenured teacher's employment is contemplated") (emphasis added). This construction by Ohio's highest court should be dispositive of how an Ohio statute operates.

Finally, O.R.C. §3319.11 uses the term "re-employ," which clearly contemplates *continuation* of an *existing* relationship, not entry into a new one. That is exactly what happens upon renewal under §3319.11 — the teacher continues to work under the same terms and conditions, with no renegotiation of employment terms, no creation of a new employment relationship, and no loss of seniority. Further, as the Court of Appeals noted, a limited teaching contract is *automatically* renewed unless the school board takes affirmative action to terminate it under §3319.11.

These undisputed points are fatal to petitioner's claim, because a change in the employment relationship is required before an act constitutes "contract formation conduct." *Patterson* made this clear in the context of promotions:

> [A] lower court . . . should not strain in an undue manner the language of §1981. Only where the promotion rises to the level of an opportunity for a *new and distinct relation* between the employee and the employer is such a claim actionable under §1981.

Patterson, 109 S.Ct. at 2377 (emphasis added). The Seventh Circuit elaborated:

> [T]he focus of inquiry should be on whether the promotion would change the terms of the contractual relationship between the employee and the employer.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1311 (7th Cir. 1989). Because renewal of plaintiff's contract would not have changed *any* terms of her employment relationship, it does not constitute contract formation activity. Accordingly, non-renewal under §3319.11 provides no basis for a §1981 action.

In sum, the issue petitioner raises is principally one of state law, and therefore is not one this Court should grant certiorari to review. Further, the courts below decided the issue correctly, so there is no error for this Court to correct.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN T. MEREDITH
(Counsel of Record)
HELEN KRYSHTALOWYCH
MARTIN HARRIS
SQUIRE, SANDERS
& DEMPSEY
1800 Huntington Building
Cleveland, Ohio 44115
(216) 687-8500

Attorneys for Respondents